In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 650

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3–7) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1956 (R. 8) and a petition for rehearing (R. 10–13) was denied on November 29, 1956 (R. 14, 16). The petition for a writ of certiorari was filed on December 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether failure of court-appointed counsel, a member in good standing of the New York state bar for

twenty years, to be admitted to practice before the District Court for the Southern District of New York, when he represented petitioner at a federal trial, constituted fraud and a denial of petitioner's right to counsel under the Sixth Amendment.

RULE INVOLVED

Rule III, General Rules of the District Court for the Southern District of New York, provided as follows:[1]

> Any person who is a member in good standing of the Bar of the State of New York, or of the Bar of the State of New Jersey, or who has been duly admitted to the Bar of either of those states when a member in good standing for five years of the Bar of some other state or territory or possession or the District of Columbia or of a foreign country, may be admitted to practice in this Court on compliance with the following provisions:
>
> Each applicant for admission shall file at least five days prior to the hearing thereon, with the Clerk of this Court, a written petition for admission, duly sworn to, setting forth the time when and court where admitted and his legal training and experience at the Bar. This petition shall be accompanied by affidavits of two attorneys of this Court stating where and when affiants were admitted to practice in this Court, how long and under what circumstances such attorneys have known petitioner, and stating what affiants know of petitioner's character and experience at the Bar. Such petition shall

[1] This rule, which was promulgated in October, 1943, was changed on March 1, 1952.

be placed at the head of the Motion calendar, and, on the call thereof, one of the attorneys whose affidavits accompany the petition shall move the admission of the petitioner, and if admitted, the petitioner's oath of office shall be taken in open Court.

Any member in good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or to try any cause in whole or in part as counsel or advocate. Only an attorney or proctor of this Court may enter appearances for parties, sign stipulations or receive payment upon judgments, decrees or orders.

STATEMENT

During trial, in December 1949, in the United States District Court for the Southern District of New York petitioner pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2 and to three years probation on counts 3 and 4 to commence upon the expiration of his term of imprisonment (R. 1–2). Petitioner's appeal from the conviction was dismissed as frivolous. He has served his sentences.

During the proceeding, petitioner was represented by court-appointed counsel, John C. Walsh (R. 1), who had been a member in good standing of the New York state bar for 21 years. Mr. Walsh, however, had not been admitted to practice before the District Court for the Southern District of New York at that time (R. 2).

In a *coram nobis* proceeding initiated July 28, 1955, petitioner asserted that Mr. Walsh's failure to be admitted to practice before the Southern District Court of New York constituted fraud and a denial of petitioner's right to counsel under the Sixth Amendment. The District Court denied the motion without a hearing (R. 1). On appeal, the judgment was affirmed (R. 8).

A prior *coram nobis* application by petitioner had gone to hearing, 122 F. Supp. 915, and an appeal from the order denying the application had been dismissed for want of prosecution. Although the particular point of counsel's failure to be admitted in the federal court was not raised, the opinion of the District Court in that prior proceeding noted that petitioner's charge that his plea of guilty had been induced by promises of his court-appointed counsel was withdrawn when the court was about to admit in evidence a letter petitioner had written to the United States Attorney thanking him for his moderate recommendation on sentencing. 122 F. Supp. at p. 920.

ARGUMENT

Adopting throughout his petition the false premise that attorney Walsh was merely a layman with no right whatever to practice law, petitioner argues that his plea was induced by fraud and resulted from the denial of his right to assistance of counsel. However, as the court below correctly observed, "The failure to comply with Rule III was a mere inadvertence, which in no way caused any infringement of [petitioner's] constitutional rights" (R. 5). As a matter of

fact, Mr. Walsh had been a member in good standing of the bar of the State of New York for more than 20 years. Under Rule III, "Any member in good standing of the Bar of any state or of any United States District Court may upon motion be admitted to argue or try any cause in whole or in part as counsel or advocate". Hence, Mr. Walsh would, on application, have been admitted as a matter of course. The court's assignment of Mr. Walsh may even be considered as constituting the admission of Mr. Walsh to the bar of the District Court for the purpose of representing petitioner. No claim is made that Mr. Walsh was incompetent; petitioner virtually concedes his competency, cavalierly dismissing that factor as "irrelevant" (Pet. 12, 14).[2]

It is not clear that petitioner's allegation, in his present *coram nobis* petition, that his plea of guilty was induced by fraud of counsel (see Pet. 15–18) was, in the context of the entire petition (see R. 1–2), intended to allege more than that the fraud and coercion resulted from the fact of Walsh's non-admission to the District Court bar. In any event, the District

[2] Cases cited by petitioner (Pet. 10) are inapposite under the factual situation in the instant case. In *Chudoff* v. *McGranery*, 179 F. 2d 869 (C. A. 3), there was no question as to validity of the plea of guilty, since it was entered after Congressman Chudoff, advised of the fact that he was not a member of the federal district court, had then been admitted on motion. In *Mays* v. *United States*, 216 F. 2d 186 (C. A. 10), the allegation that counsel had not been admitted to practice in either the state or federal courts in Kansas (as contrasted with the instant case where Mr. Walsh was admited in New York and thus eligible for federal admission) was suggestive of counsel's incompetency. The court held that the accused was at least entitled to a hearing on the issue, instead of having his motion to vacate sentence summarily dismissed.

Court was not required to hold a hearing on that allegation in view of the history of the same charge in the prior proceeding. See the Statement, *supra*, p. 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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